



**INDIANA COURT OF APPEALS
ORAL ARGUMENT AT A GLANCE
BROWNSBURG ROTARY CLUB**

PRIME MORTGAGE USA, INC. AND DAVID M. LAW v. DELIE T. NICHOLS

Appeal from:

Marion Superior Court, Civil
Division
The Honorable Kenneth H.
Johnson, Judge

Oral Argument:

Thursday, January 10, 2008
12:15—12:55 p.m.
20 minutes each side

CIVIL LAW

Is the instant action, a lawsuit for damages stemming from an allegedly forged document, barred by the statute of limitations?

Assuming the action is not barred, are the defendants entitled to have a jury determine the amount of damages?

CASE SYNOPSIS

**Facts and Procedural
History**

In 1990, Delie Nichols, David Law, and two other people formed Prime Mortgage USA, Inc., which issued 200 shares of stock. Within a few years, the other two people left the company, leaving Nichols and Law each in control of 100 shares of Prime stock. At some point, the business relationship between Nichols and Law deteriorated and Nichols informed Law that she wished to sell her stock in Prime. The parties did not negotiate a buyout, and on May 31, 2001, Nichols filed a complaint seeking the appointment of a **receiver** and **dissolution** of Prime, alleging that she and Law were 50/50 shareholders in Prime, in which corporate deadlock existed, and seeking unpaid wages. In his response, the defendants claimed that Nichols did not have a 50% interest in Prime, as Law had previously issued Prime stock to his daughter

and another company employee. The defendants further claimed that Nichols had authorized such a transaction pursuant to a Share Authorization Document (the "Document"), which they claimed Nichols had signed. On April 23, 2003, Nichols filed her amended complaint, adding a claim of breach of fiduciary duty and alleging that Law improperly induced Nichols to sign the Document. On April 7, 2005, the trial court granted Nichols permission to file a third amended complaint, in which Nichols deleted the allegation that Law induced her to sign the Document and instead claimed that Law forged her signature on the Document. Nichols now sought treble damages pursuant to Indiana Code section 34-24-3-1 (the "Crime Victims Statute"). The defendants filed a motion for summary judgment on the Crime Victims Statute count, and the trial court denied this motion on October 14, 2005.

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CASE SYNOPSIS



Unhappy with Law and Prime's responses to her **discovery requests**, Nichols also filed a motion for **sanctions**. On December 8, 2005, the trial court entered an order granting Nichols's motion for sanctions (the "Sanctions Order"), dismissing the Defendants' counterclaims, and granting **default judgments** against the defendants on counts III (breach of fiduciary duty), VI (unpaid wages), and VII (forgery) of Nichols's complaint. The trial court based its Sanctions Order on the grounds that the defendants produced the Share Authorization Document, which the trial court found to be forged, and their "contumacious disregard" of discovery obligations. On January 30, 2006, the trial court denied Law and Prime's motion to certify the Sanctions Order for **interlocutory appeal** on the issue of whether the Defendants were entitled to a jury trial on the amount of damages under the Crime Victims' Statute.

On October 16, 2006, the trial court entered its judgment awarding Nichols \$2,500,000 in compensatory damages for the value of her 50% ownership in Prime, trebled to \$7,500,000; \$6,330.02 in unpaid wages, trebled to \$18,990.06; and \$402,891.28 in attorneys' fees. Prime and Law now appeal.

Parties' Arguments

I. Jury Trial

Criminal defendants and civil litigants have a right to a jury trial in certain cases under Article I, Sections 19 and 20 of the Indiana Constitution. The defendants argue that they are entitled to a jury trial on the issue of damages under

the Crime Victims Statute. They argue that because the Crime Victims' Statute awards damages in excess of compensatory damages, it is akin to a criminal punishment, and therefore, the Indiana Constitution guarantees a jury trial. Nichols argues that the damages were awarded as sanctions for discovery violations and that the defendants are therefore not entitled to a jury trial. If this court determines the defendants are entitled to a jury trial on the issue of damages, we will reverse the trial court's damage determination and **remand** for a jury trial.

II. Statute of Limitations

Prime and Law also argue that Nichols's claim under the Crime Victims' Statute is barred by the statute of limitations. They argue that a claim under the Crime Victims' Statute must be brought within two years, and that Nichols should have discovered that she had a cause of action for forgery more than two years before she filed her claim. Nichols argues that she did not discover that she had a cause of action until she actually compared the Document to another document and determined that she had not actually signed the Document. As she did not make this discovery more than two years before she filed her claim, she argues the statute of limitations does not preclude her action. Thus, the issue of when Nichols should have discovered the alleged forgery is important to the resolution of this issue.

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GLOSSARY



Fiduciary Duty – A duty arising when certain legal relationships exist; the fiduciary has a duty to deal in good faith, act with honesty and candor, and protect the other party's interests.

Compensatory Damages – Damages meant to compensate an injured party for the actual amount of harm suffered by that party.

Crime Victims' Statute – Under this statute, a victim of certain crimes (including theft, forgery, and deception) may bring a civil law suit seeking damages three times those actually suffered, attorney's fees, and the costs associated with bringing the lawsuit.

Default Judgment – A judgment entered either as a result of a party's failure to defend a lawsuit or as a penalty for failing to comply with a trial court's orders.

Discovery Requests – Discovery is the process through which parties learn about the facts related to the case. A party may request documents, ask questions, hold depositions, and ask that the other party admit certain facts or circumstances.

Dissolution – The termination of a corporation's legal existence.

Interlocutory Appeal – An appeal taken before a case is fully completed. Under Indiana's trial rules, certain interlocutory actions are appealable as of right; for other actions, a party must receive permission from the trial court.

Receiver – A person appointed by the court to handle a corporation's affairs and protect its property.

Remand – When an appellate court sends an action back to a lower court in order for that court to take some action or hold further proceedings.

Sanctions – Court-ordered punishments such as fines or, in extreme cases, dismissal of an action or a default judgment.

Summary Judgment – A judgment issued before a full trial on the issues. A trial court will grant a motion for summary judgment only if it determines there is no genuine issue of material fact.

Statute of Limitations – A statute establishing a time limit for filing a lawsuit.

TODAY'S PANEL OF JUDGES

Hon. James S. Kirsch (Marion County), Presiding

- Judge of the Court of Appeals since March 1994

James S. Kirsch was appointed to the Court of Appeals in March 1994 and served as Chief Judge from March 1, 2004 to February 28, 2007. A native of Indianapolis, Judge Kirsch is a graduate of the Indiana University School of Law at Indianapolis (J.D., cum laude, 1974) and Butler University (B.A. with honors, 1968).

Judge Kirsch served as Judge of the Marion Superior Court from 1988 to 1994 and as presiding judge of the court in 1992. From 1974 to 1988, he practiced law with the firm of Kroger, Gardis & Regas in Indianapolis in the areas of commercial and business litigation and served as managing partner of the firm. Since 1990, he has held an appointment as Visiting Professor of Law and Management at the Krannert Graduate School of Management at Purdue University.

Judge Kirsch is a past-president of the Indianapolis Bar Association and of the Indianapolis Bar Foundation and is a former member of the Board of Visitors of the Indiana University School of Law-Indianapolis. He is a past-president of the United Way/Community Service Council Board of Directors and a current or

former member of the Board of Directors of the United Way of Central Indiana, of the Board of Associates of Rose Hulman Institute of Technology, and of the Boards of Directors of the Goodwill Industries Foundation of Central Indiana, Community Centers of Indianapolis, the Indianapolis Urban League, the Legal Aid Society of Indianapolis, and the Stanley K. Lacy Leadership Association. He is a Fellow of the Indiana State Bar Foundation and of the Indianapolis Bar Foundation.

Judge Kirsch is a frequent speaker and lecturer and has served on the faculty of more than 200 continuing legal education programs. He has been named a Sagamore of the Wabash by four different governors.

Judge Kirsch and his wife have two children. He was retained on the Court in 1996 and 2006.

The Court of Appeals hears oral argument at venues across the state to enable Hoosiers to learn about the judicial branch.

This initiative began statewide just prior to the Court's centennial in 2001.

Today's oral argument is the 201st case the Court of Appeals has heard "on the road" since early 2000.

Sites for traveling oral arguments are often law schools, colleges, high schools, and county courthouses.

TODAY'S PANEL OF JUDGES

Hon. Margret G. Robb (Tippecanoe County)

- Judge of the Court of Appeals since July 1998

Margret G. Robb was appointed to the Indiana Court of Appeals in July 1998 by Gov. Frank O'Bannon. She holds a B.S. and M.S. in Business Economics from Purdue, and is a 1978 Magna Cum Laude graduate of Indiana University School of Law - Indianapolis.

Prior to joining the Court, Judge Robb was engaged in the general practice of law for 20 years in Lafayette and was a Chapter 11, 12 and a Standing Chapter 7 Bankruptcy trustee for the Northern District of Indiana; and the Federal Advisory Committee for the expediting of Federal Litigation. She was a registered family and civil law mediator and served as a Tippecanoe County Deputy Public Defender. She chairs the Supreme Court Task Forces on Family Courts, the development of Trial Court Local Rules, and is involved in several projects to benefit the Indiana legal system. She has also served as a member of the Indiana Board of Law Examiners, the Governance Committee of the Supreme Court IOLTA (Interest On Lawyers' Trust Accounts) Committee; the Federal Advisory Committee on Local Rules for the Federal Court for the Northern District of Indiana; and Federal Advisory Committee for the expediting of Federal Litigation.

Judge Robb has held numerous Board positions for and been an officer for the Indiana State Bar Association, Indiana Bar Foundation, Tippecanoe County Bar Association, Indianapolis Bar Association, Indianapolis Bar Foundation, American Bar Foundation, National Association of Women Judges, Indiana University School of Law at Indianapolis Alumni Association, and speaks frequently on legal topics for attorneys and other judges. Judge Robb was Founding Chair of the Governor Otis Bowen's Commission on the Status of Women; was a recipient of the 1993 Indiana State Bar Association's "Celebrating 100 Years of Women in the Legal Profession" award; the 2001 Maynard K. Hine distinguished alumni award, given in recognition of support and service to IUPUI and Indiana University; the 2004 Bernadette Perham "Indiana Women of Achievement" Award, bestowed by Ball State University in honor of one of their outstanding professors; the 2005 Indiana State Bar Association's Women in the Law Recognition Award; and the 2006 Tippecanoe County YWCA Salute to Women "Women of Distinction" Award.

Judge Robb, who was retained on the Court of Appeals by election in 2000, is married to a professor at Purdue. Their son, a graduate of the United States Naval Academy, is on active duty in the United States Navy.

The 15 judges of the Indiana Court of Appeals issue more than 2,500 written opinions each year.

The Court of Appeals hears cases only in three-judge panels. Panels rotate three times per year. Cases are randomly assigned.



TODAY'S PANEL OF JUDGES

Hon. Paul D. Mathias (Allen County)

- Judge of the Court of Appeals since March 2000



Paul D. Mathias was appointed to the Court by Governor Frank O'Bannon in March, 2000. Judge Mathias is a fifth generation Hoosier and grew up in Fort Wayne. He graduated from Harvard University, *cum laude*, in 1976 and from Indiana University School of Law – Bloomington in 1979, where he was a member of the law school's Sherman Minton Moot Court Team and *Order of Barrister*.

Judge Mathias practiced law for six years in Fort Wayne, concentrating in construction law, personal injury and appellate practice. In 1985, he was appointed Referee of the Allen County Small Claims Court,

where he served until his appointment as Judge of the Allen Superior Court – Civil Division by Governor Evan Bayh in 1989.

Judge Mathias served as an officer of the Indiana Judges Association from 1993 to 1999 and as its president from 1997 to 1999. He received the Centennial Service Award from the Indiana State Bar Association in 1996, and a Sagamore of the Wabash Award from two governors.

Judge Mathias, who was retained on the Court of Appeals by election in 2002, is married and has two sons.

ATTORNEYS FOR THE PARTIES

For Appellants, Prime Mortgage USA, Inc.:

Anthony Mommer
Krieg DeVault LLP
Indianapolis

The litigation experience of **Anthony W. Mommer**, a partner at Krieg DeVault in Indianapolis, can be best described as general civil litigation, including but not limited to commercial litigation, lender liability, securities litigation, trust and estate litigation, and eminent domain. He focuses his practice in the areas of Trial and Appellate Litigation in the State and Federal Courts.

Mr. Mommer received his A.B., With Distinction, from Indiana University in 1965. He earned his J.D., *cum laude*, from Indiana University School of Law-Bloomington in 1968. He was Order of the Coif and a member and Note Editor of the Indiana Law Journal. Mr. Mommer earned member-

ship in Phi Beta Kappa as an undergraduate.

Mr. Mommer is a member of the Indianapolis, Indiana, and American Bar Associations. He is admitted to practice before the United States District Court for the Southern District of Indiana and the U.S. Court of Appeals for the 7th Circuit.

Among his published works is *A New Look at the Attorney-Client Privilege in Discovery to Trustees from Beneficiaries*, *Res Gestae*, Vol. 44, No. 3, 2000.

For Appellant, David M. Law:

Ronald G. Sentman
Katz & Korin
Indianapolis

Ronald G. Sentman is an attorney with the law firm of Katz & Korin, P.C., in Indianapolis. He has been an attorney for more than 20 years and concentrates his practice in civil litigation of all kinds in the state and federal court systems, at both the trial and appellate court levels. Currently, his caseload consists primarily of business disputes, but he has also represented clients in other matters such as product liability, asbestos litigation, construction disputes and issues relating to claims against attorneys and accountants.

Mr. Sentman received his B.A. degree and also his J.D. degree (*cum laude*) from Indiana University. During law school, he was a staff member of the Indiana Law Journal. He is admitted in all Indiana state courts as well as the U.S. Court of Appeals for the Seventh Circuit and the U.S. District Courts for the Northern and Southern Districts of Indiana. His hometown is Elwood, Indiana.



ATTORNEYS FOR THE PARTIES

For Appellee, Delie T. Nichols:

**Linda Pence
Sommer Barnard
Indianapolis**



Linda Pence has been a practicing trial attorney for 34 years, beginning her legal career with the U.S. Department of Justice in 1974. Ms. Pence tried her first case in 1975 and has been representing litigants in Federal and State courts ever since, both at trial and on appeal. She has extensive experience in the investigation, prosecution and defense of corporations and individuals in white collar criminal matters involving mortgage and consumer fraud, environmental offenses, Medicare/Medicaid and health care fraud, kickback schemes, bribery, bid-rigging, embezzlement, official misconduct, RICO, insurance fraud, bank fraud, customs and currency violations, securities fraud, and other financial and business improprieties.

Ms. Pence has conducted independent internal investigations on behalf of corporations and governmental entities regarding alleged improprieties by employees and others.

She also has extensive experience in matters involving complex regulatory and financial transactions, voluminous documents, and hundreds of witnesses. Besides fraud and RICO civil litigation, she has handled a variety of other civil matters, including cases involving regulatory practices, intellectual property, patents, and franchise businesses.

Ms. Pence received her B.A. from Indiana University in 1971 and her J.D. from Indiana University School of Law in 1974. She is a member of the bar of Indiana and the District of Columbia and is admitted to practice before the United States District Court for the Northern and Southern Districts of Indiana, the United States Court of Appeals for the Fourth, Seventh, Ninth, Tenth and Federal Circuits, and the United States Supreme Court.

Ms. Pence was with the United States Department of Justice in Washington for nine years (1974-1983) where she was the Chief, Special Projects Branch, Deputy Chief, Government Fraud Section, Criminal Division, 1978-1983, and Trial Attorney, Civil Division, 1974-1978. She is a former instructor of the FBI Academy, the Federal Law Enforcement Training Center, and the Offices of the Inspector General and the Legal Education Institute of the Department of Justice.

Ms. Pence is President of the Indianapolis Metropolitan Police Merit Board, a member of the Board of Directors of the Indianapolis Symphony Orchestra, a member of the Advisory Council of the Indianapolis Zoological Society, Inc., a founding member and past president (1993-99) of the Board of Directors of the Indiana Federal Community Defenders, and a member of the Advisory Board of the Care for Kids Foundation.. She was recognized by the *Indianapolis Business Journal* and the *Indiana Lawyer* as one of the "1997 Influential Women in Indianapolis."